

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

BIRMINGHAM ASSOCIATES LTD,

Plaintiff,

— against —

ABBOTT LABORATORIES,

Defendant.

07 Civ. 11332 (SAS)

**SECOND AFFIRMATION OF GEORGE K. FOSTER**

I, George K. Foster, declare pursuant to 28 U.S.C. section 1746 as follows:

1. I am an attorney duly admitted to practice before this Court and am counsel with Dechert LLP, attorneys of record for plaintiff Birmingham Associates Ltd. (“Birmingham”). I respectfully submit this affirmation in further support of Birmingham’s cross-motion for an order enjoining ADR.

2. On or about February 15, 2008, my colleague, Daniel C. Malone, Esq., sent a letter to William F. Cavanaugh, Jr., Esq., counsel for proposed-intervenor ALVE Laboratories Vascular Enterprises, Ltd. (“ALVE”), in which he proposed that ALVE agree to hold in abeyance the ADR proceeding that ALVE had initiated on February 11, 2008, until the Court has decided the pending motions to compel ADR filed by ALVE and Defendant Abbott Laboratories. A copy of that letter was submitted as Exhibit A to the Declaration of Nicolas Commandeur dated February 29, 2008 in this matter (“Commandeur Declaration”).

3. On or about February 19, 2008, I sent a message by electronic mail to Nicholas Commandeur, Esq., Mr. Cavanaugh’s colleague, in which I reiterated Mr. Malone’s

proposal of February 15, and indicated that “if ALVE will not agree to [that proposal], it is likely that we will seek a preliminary injunction staying the ADR proceeding by OSC.” I noted further in that letter that Birmingham would not consider it necessary to file the instant cross-motion if ALVE would agree not to pursue an ADR proceeding as to the issues that are the subject of ALVE’s motion to intervene and compel if the Court denies that motion, and asked him to advise whether or not ALVE was amenable to that proposal. A copy of that message was submitted as Exhibit B to the Commandeur Declaration.

4. Mr. Commandeur contacted me by telephone later the same day, and we discussed the issues raised in my message. He indicated, however, that his client needed more time to consider those issues.

5. On or about February 20, 2008, Mr. Cavanaugh sent a letter to Mr. Malone in which he stated, among other things, that ALVE would “hold the entire ADR proceeding in abeyance pending resolution of our motion to compel.” A copy of that letter was submitted as Exhibit C to the Commandeur Declaration.

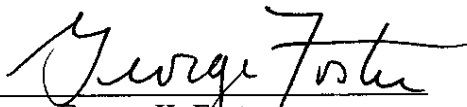
6. On or about February 21, 2008, my colleague, Daniel C. Malone, Esq., sent by electronic mail a letter to Mr. Cavanaugh in which he confirmed an agreement by ALVE and Birmingham, through their counsel, to hold the ADR proceeding in abeyance pending the Court’s rulings, and offered Birmingham’s proposal to strike the instant cross-motion if ALVE would agree not to “pursue an ADR proceeding as to the issues that are the subject of [ALVE’s] motion to intervene and compel if the Court denies that motion.” A true and correct copy of this letter is attached hereto as Exhibit A.

7. On or about February 22, 2008, Mr. Commandeur left me a voicemail message in which he indicated that ALVE would not agree to Birmingham's proposal relating to the cross-motion, and that the parties should proceed with briefing the cross-motion according to the schedule that Birmingham had proposed.

8. Later that day, Mr. Malone sent a letter to Mr. Cavanaugh by electronic mail memorializing Mr. Commandeur's voicemail. This letter also attached a proposed stipulation setting forth a briefing schedule that provided, among other things, that Birmingham file its reply brief in further support of its cross-motion on or before March 7, 2008. A true and correct copy of this letter and proposed stipulation is attached hereto as Exhibit B.

9. On or about February 26, 2008, as reflected in Exhibit C attached hereto, the Court so-ordered that stipulation.

I declare under penalty of perjury under the laws of United States of America that the foregoing is true and correct. Executed on March 7, 2008, at New York, New York.

  
George K. Foster

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DANIEL C. MALONE  
Partner

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February 21, 2008

**VIA EMAIL**

William F. Cavanaugh, Jr.  
Patterson Belknap Webb & Tyler LLP  
1133 Avenue of the Americas  
New York, NY 10036-6710

Re: *Birmingham Assocs. Ltd. v. Abbott Laboratories*,  
07 CV 11332 (SAS) (S.D.N.Y.)

Dear William:

I have your letter of yesterday, which I take to have been sent on behalf of Abbott Laboratories Vascular Enterprises, Ltd. ("ALVE"), responding to my letter of February 15 on behalf of our client, Birmingham Associates, Ltd. ("Birmingham").

We take an entirely different view of the "inter-twinedness" of issues that you purport to identify and of your assertion that ALVE (again, I assume you were writing on behalf of ALVE) was "forced" to seek to intervene in this action and to file a motion to compel. We are confident that we have filed Birmingham's complaint against Abbott Laboratories in conformity with the Keep Well Agreement and view ALVE's positions as adjuncts to Abbott's efforts to avoid its own agreement to litigate Birmingham's Keep Well claim. In general, though, we see no point in counsel rehearsing arguments in correspondence in this manner and suggest that we might forgo the practice in the future.

Turning to the substance of your letter, we appreciate ALVE's agreement to hold any ADR procedure in abeyance pending the Court's resolution of ALVE's motion to compel. I indicated in my February 15 letter Birmingham's willingness to consider such an agreement. We view counsel as having now concluded that agreement on behalf of their respective clients, obviating any need for Birmingham to seek a preliminary injunction to the same effect.

There remains the matter of Birmingham's cross-motion. As George Foster noted in a February 19 voice-mail message and a follow-up email to your colleague, Nico Commandeur, that cross-motion would be unnecessary if ALVE would agree that it would not pursue an ADR proceeding as to the issues that are the subject of its motion to intervene and compel if the Court denies that motion. Please let us know if ALVE is willing to do so in a stipulation and proposed order to strike Birmingham's cross-motion.

Dechert  
LLP

William F. Cavanaugh, Jr.  
February 21, 2008  
Page 2

Alternatively, if ALVE is unwilling to enter into such a stipulation, please let us know whether ALVE would agree to the briefing schedule that George proposed for the cross-motion: that ALVE's opposition would be due on February 29, together with its reply brief with respect to its motion to intervene and compel, and Birmingham's reply brief with respect to the cross-motion would be due a week later, on March 7.

Sincerely,

A handwritten signature in black ink, appearing to read "D. Malone", with a stylized flourish at the end.

Daniel C. Malone



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New York, NY 10112-2200  
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DANIEL C. MALONE  
Partner

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February 22, 2008

**VIA EMAIL**

William F. Cavanaugh, Jr.  
Patterson Belknap Webb & Tyler LLP  
1133 Avenue of the Americas  
New York, NY 10036-6710

Re: *Birmingham Assocs. Ltd. v. Abbott Laboratories*,  
07 CV 11332 (SAS) (S.D.N.Y.)

Dear William:

I write on behalf of our client, Birmingham Associates, Ltd. ("Birmingham").

I understand from a voicemail left by your colleague, Nicolas Commandeur, for my colleague, George Foster, that your view on behalf of Abbott Laboratories Vascular Enterprises, Ltd. ("ALVE"), is that a stipulation and proposed order to strike Birmingham's cross-motion, which I proposed in my letter of yesterday, is not practicable and that the parties therefore should proceed with briefing the cross-motion. I also understand from Nico's message that you are amenable to the briefing schedule I proposed in the alternative.

On the following pages of this document is a stipulation and proposed order to set that schedule: ALVE's opposition to the cross-motion will be due on February 29, together with its reply brief with respect to its own motion to intervene and compel, and Birmingham's reply brief with respect to the cross-motion would be due on March 7. Please sign and date it, and return it to me for submission to the Court.

Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel C. Malone", written in a cursive style.

Daniel C. Malone

cc: George K. Foster

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

BIRMINGHAM ASSOCIATES LTD,

Plaintiff,

— against —

ABBOTT LABORATORIES,

Defendant.

07 Civ. 11332 (SAS)

**STIPULATION AND  
PROPOSED ORDER**

IT IS HEREBY STIPULATED by and between the parties, that, plaintiff Birmingham Associates Ltd.'s Cross-Motion for an Order Enjoining Alternative Dispute Resolution (the "Cross-Motion") having been filed on February 19, 2008, proposed intervenor Abbott Laboratories Vascular Enterprises, Ltd.'s opposition to the Cross-Motion shall be filed on or before February 29, 2008, and plaintiff's reply in further support of the Cross-Motion shall be filed on or before March 7, 2008.

Dated: February \_\_, 2008

PATTERSON, BELKNAP, WEBB  
& TYLER LLP

William F. Cavanaugh, Jr.

Nicolas Commandeur

1133 Avenue of the Americas

New York, New York 10036

Tel: (212) 336-2000

Fax: (212) 336-2222

*Attorneys for Proposed Intervenor*

*Abbott Laboratories Vascular Enterprises Ltd.*

  
DECHERT LLP

Daniel C. Malone

George K. Foster

Ross L. Hirsch

30 Rockefeller Plaza

New York, New York 10112

Tel: (212) 698-3500

Fax: (212) 698-3599

*Attorneys for Plaintiff Birmingham*

*Associates, Ltd.*

**SO ORDERED:**

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**Hon. Shira A. Scheindlin, U.S.D.J.**



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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

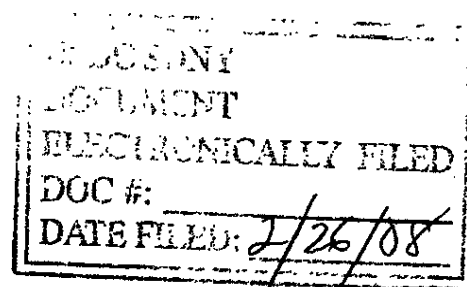
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07 Civ. 11332 (SAS)

STIPULATION AND  
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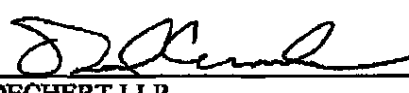
IT IS HEREBY STIPULATED by and between the parties, that, plaintiff

Birmingham Associates Ltd.'s Cross-Motion for an Order Enjoining Alternative Dispute Resolution (the "Cross-Motion") having been filed on February 19, 2008, proposed intervenor Abbott Laboratories Vascular Enterprises, Ltd.'s opposition to the Cross-Motion shall be filed on or before February 29, 2008, and plaintiff's reply in further support of the Cross-Motion shall be filed on or before March 7, 2008.

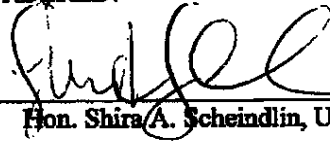
Dated: February 25, 2008

  
PATTERSON, BELKNAP, WEBB  
& TYLER LLP

William F. Cavanaugh, Jr.  
Nicolas Commandeur  
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*Attorneys for Proposed Intervenor  
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Fax: (212) 698-3599  
*Attorneys for Plaintiff Birmingham  
Associates, Ltd.*

SO ORDERED:

A handwritten signature in black ink, appearing to read "Shira A. Scheindlin", written over a horizontal line.

Hon. Shira A. Scheindlin, U.S.D.J.

2/26/08